Supreme Court, U.S.
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99 18 47 MAY 17 2000
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No. _____

In The

Supreme Court of the United States

WILLIAM C. DEWBERRY,

Petitioner,

vs.

TEXAS UTILITIES ELECTRIC COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an employment discrimination case under Title VII and Section 1981, does a *prima facie* case of discrimination, combined with evidence that the non-discriminatory reasons offered an employer are false, constitute evidence of intentional discrimination sufficient to survive a defense motion for summary judgment?

2. May the trial and appellate courts properly consider whether evidence of pretext is "strong" or "weak," or whether a *prima facie* case is "substantial," in deciding whether there is evidence of intentional discrimination sufficient to survive a defense motion for summary judgment?

3. What is the quantum of proof required to survive a defense motion for summary judgment in an employment discrimination case under Title VII and Section 1981?

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CITATIONS TO THE JUDGMENT AND OPINION TO BE REVIEWED

Dewberry v. Texas Utilities Electric Company,
No. 99-10912 (5th Cir. February 17, 2000) (per curiam)

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgment and opinion of the court of appeals pursuant to 28 U.S.C. §1254.

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were issued on February 17, 2000. This petition is filed within ninety days of that date as required by 28 U.S.C. §2101(c). Sup. Ct. R. 13.1.

THE STATUTES INVOLVED

42 U.S.C.S. §1981 provides:

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance,

modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U. S. C. §2000e-2 provides:

(a) Employer practices.

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . .

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices.

Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any

employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

This is an employment discrimination case brought under Title VII of the Civil Rights Act of 1991, 42 U.S.C. §2000e; Section 1981, 42 U.S.C. §1981; and the Texas Commission on Human Rights Act, TEX. LABOR CODE §21.051 (Vernon 1996).

William Dewberry timely filed this suit in the United States District Court for the Northern District of Texas after receiving the requisite Dismissal and Notice of Rights from the Equal Employment Opportunity Commission. Dewberry, an African-American, alleged racial discrimination in the denial of three separate promotions. The district court had federal question jurisdiction over the case pursuant to 28 U.S.C. §1331.

The defendant, Texas Utilities Electric Company ("TU Electric"), filed a motion for summary judgment. The grounds alleged were: (1) the absence of a *prima facie* case of racial discrimination or retaliation; (2) the existence of a legitimate, non-discriminatory reason for Dewberry's failure to be promoted; and (3) the absence of evidence that the profferred reason was pretextual, and that the real reason was discrimination or retaliation.

The district court granted summary judgment for the defendant. For each of the three promotions at issue, the district court found that Dewberry had established a *prima facie* case of discrimination and/or retaliation, that

TU Electric had articulated a legitimate, non-discriminatory reason for Dewberry's failure to be promoted, and that there was no evidence that TU Electric's real reason was discrimination and/or retaliation.

The court of appeals issued a short memorandum opinion stating that the judgment was affirmed for the reasons stated in the district court's opinion.

The summary judgment evidence showed the following:

William Dewberry has been an employee of TU Electric and its predecessor company continuously since June 13, 1967, other than a brief absence to serve in the U.S. Military from October 15, 1968 to May 13, 1970. He has an Associates Degree in Electrical Technology. He is currently employed as a Senior Engineering Technician. He has held that title since July, 1991, but has had the same responsibilities under different titles since May, 1983. The job duties of a Senior Engineering Technician consist primarily of providing technical support and advice to distribution crews with respect to the construction, operation and maintenance of TU's electrical distribution systems, from the substation to the customer's meter.

Prior to the incidents that are the subject of this suit, Dewberry's most recent Performance Review and Appraisal was outstanding. His supervisor, Richie Croft, wrote that Dewberry "knows assigned responsibilities, needs little supervision or assistance." He also noted that Dewberry "makes adjustments as needed to accomplish assigned duties," and "Mr. Dewberry presents himself

well. Gets along with fellow employees." Dewberry's personnel file contained a number of letters from TU customers expressing their thanks and appreciation for jobs well-done. Although Dewberry was but one of eleven Senior Engineering Technicians in TU's Central Region, he had responsibility for 24% of TU's high-profile customers in that Region, while the other ten technicians had responsibility for the remaining 76%. His supervisor concluded that Dewberry was "ready for advancement." The Performance Review and Appraisal covered the period from August, 1996 through August, 1997.

In June, 1997, TU Electric created the new position of Lead Distribution Operations Technician (hereinafter, "Lead Technician") at each of the three service centers in the Central Region, in order to be consistent with TU's other four regions in the area. TU stated that the Lead Technician position would perform the technical work of the Senior Engineering Technician, plus some supervisory responsibilities such as assigning work to other technicians, evaluating other technicians, and resolving customer complaints. However, Dewberry's file showed that he had already done work resolving customer complaints. Moreover, TU admitted that 90% of the Lead Technician's job was the same as the Senior Engineering Technician. The Lead Technician position paid just $169 more per month. However, it was considered the highest step of progression in the technician classification, and was designed to afford technicians the opportunity to "acquire leadership and supervisory experience."

Because of the similarity between the positions, only the eleven Senior Engineering Technicians were interviewed for the Lead Technician positions. This decision

was contrary to TU's normal policy to post the position and make it available to other TU employees. It also allowed the interview panel to make its selections without the oversight of the personnel department.

The technicians considered consisted of eight white males, two black males and one black female. They were interviewed by a panel consisting of six white males. Three white males were selected to fill the positions.

In response to Dewberry's EEOC charges, TU stated that the candidates were selected primarily on their technical experience and skills and interpersonal skills, with emphasis on exemplified leadership skills. TU stated that Dewberry did not express his ideas well, which left doubt about his competency with regard to the technical aspects of his job, as well as his ability to communicate. In a letter to Dewberry about a month later, TU told him that his qualifications and knowledge of the job were comparable to that of the others. TU said only that his answers to interview questions lead to lower evaluations on leadership, interpersonal and communication skills. However, four of the six interviewers could only remember one question that Dewberry had been asked, and coincidentally, it was the same question they remembered.

In the course of this litigation, TU asserted that the interviewers also evaluated the candidates on the basis of their personal experience with them. One interviewer, Richard Reeves, claimed that his personal experience with Dewberry indicated that he was not as approachable as he needed to be to be an effective leader. Another interviewer, Gary Roberts, also said that his personal experience was that Dewberry needed to be more

approachable, and added that each successful candidate had more technician experience. Debbie Morton, TU's Senior Human Resources Representative, said only that the successful candidates had held the technician job classification longer, ignoring the fact that Dewberry had long done the same work under a different classification. Dewberry had been with TU longer than the successful candidates, and had held far more technical responsibility in terms of the number of feeders, substations and capacitor banks he oversaw. When Dewberry asked Richie Croft, his direct supervisor and one of the interviewers, how he could improve his performance review rating Croft stated that he would have to "walk on water, or at least know where the rocks are."

In November, 1997, TU posted an opening for a Distribution Operations Supervisor in the Arlington Region. The posted job notice identified the required qualifications as a two-year technical degree or equivalent work experience, and knowledge of other job-related information. There was no mention of supervisory experience being required. TU admits that the job posting listed the "minimum qualifications" for the position.

The person responsible for selecting the Distribution Supervisor was Richard Reeves, the same individual who had been involved in selecting the Lead Technicians in the Central Region. Approximately thirty-seven people applied for the position, including Mr. Dewberry.

Reeves initially decided to interview only nine of the applicants, none of whom were African-American. Reeves stated that this was done to narrow the pool to those having prior supervisory experience. It was only

after discussions with Debbie Morton, TU's Senior Human Resources Representative, that Reeves decided to interview Moses Ward, a black male. However, Ward had not even applied for the position, and did not have the supervisory experience Reeves claimed was necessary. Reeves selected a white male as the successful candidate. Shortly thereafter, TU also promoted into a Distribution Supervisor's position another white male who lacked both supervisory experience and a degree.

An opening for a Lead Technician in Mesquite occurred in or around April, 1998. Eighteen TU employees, including Dewberry, applied for the position, and TU decided to interview eleven of the applicants. The interview panel chose Dennis Norman, a white male, to fill the position. Unlike Dewberry, Mr. Norman did not have an associate degree. Norman also lacked the experience in a high-density distribution area that Dewberry had. Dewberry also had more years of experience as a technician than did Norman. TU stated that it was Dewberry's actions during his interview that caused TU not to promote him. Dewberry allegedly refused to answer questions and instead referred the interview panel to his personnel file. However, Dewberry disputes this account of the interview. Dewberry answered the questions asked, and then referred the panel to his personnel file for verification.

Two of the three interviewers for the Mesquite Lead Technician position, Gilbert Rascon and Kyle Davis, had a conversation with Debbie Dennis about Dewberry's prior complaint to the EEOC. Rascon and Davis both testified that they spoke to her either the same day after the interview or the next morning. Although both denied that

this information affected their selection process, Davis had already made a special effort to record the interview with Dewberry. Coincidentally, Davis had also spoken to Dewberry's supervisor, Richie Croft, *before* the interview. Davis reported only that Croft had told him that Dewberry did not "interview well."

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals are Divided on the Quantum of Proof Required to Survive a Motion for Summary Judgment under Title VII and Section 1981.

A. The Circuits Disagree on How to Apply *Hicks* in a Summary Judgment Context.

Dewberry alleged causes of action under Title VII of the Civil Rights Act of 1991, 42 U.S.C. §2000e; Section 1981, 42 U.S.C. §1981; and the Texas Commission on Human Rights Act, TEX. LABOR CODE §21.051 (Vernon 1996). The district court correctly observed that the elements required for each are essentially the same. (See Appendix B). *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 603, 139 L. Ed. 2d 491 (1997).

The shifting burdens of production in employment discrimination cases are well-established. First, the plaintiff must establish a *prima facie* case of discrimination; second, if he is so successful, the defendant must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant is so successful, the inference of discrimination

raised by the prima facie case disappears, and the plaintiff then must prove, by a preponderance of the evidence, both that the defendant's articulated reason is false and that the defendant intentionally discriminated. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11, 113 S. Ct. 2742, 2748-49, 125 L. Ed. 2d 407 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-55, 101 S. Ct. 1089, 1093-94, 67 L. Ed. 2d 207 (1981).

This Court's decision in *Hicks* involved the review of a final judgment after trial. However, the circuit courts are in disagreement about how to apply *Hicks* to a defense motion for summary judgment. The disposition of this case by the lower courts was governed by the Fifth Circuit's prior opinion in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (en banc). Petitioner will show that the Fifth Circuit has construed *Hicks* in a manner that is inconsistent with both the basic summary judgment standard of review and with the majority of circuits that have considered the issue.

B. The District Court Correctly Found the Existence of a *Prima Facie* Case

To establish a *prima facie* case of discriminatory failure to promote, Dewberry must introduce evidence: (1) that he belongs to a group protected by Title VII; (2) that he was qualified for the job; (3) that he was not promoted; and (4) that TU Electric promoted a person who is not in his protected class. *Gonzales v. Carlin*, 907 F.2d 573, 578 (5th Cir. 1990).

The district court correctly found that Dewberry had introduced evidence to support a *prima facie* case with

respect to each of the three promotions he sought. (See Appendix B).

C. TU Electric's Articulated Non-Discriminatory Reasons are False

Dewberry did not dispute, for purposes of the summary judgment hearing only, that the reasons given by TU Electric for not promoting him would, if believed by a jury, constitute non-discriminatory reasons. Consequently, the sole remaining issue was to determine the quantum of proof necessary to create a fact issue on whether TU Electric's articulated reasons were a pretext for discrimination.

Inconsistencies in the movant's summary judgment evidence on a material fact create obvious questions of credibility and a fact question inappropriate for summary judgment. *Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315, 320 (5th Cir. 1997). A plaintiff may demonstrate pretext by showing that the employer's explanation is unworthy of credence. *Walton v. Bisco Industries, Inc.*, 119 F.3d 368, 370 (5th Cir. 1997).

The nondiscriminatory reasons proffered by TU Electric for Dewberry's non-promotion are riddled with inconsistencies to the point where a reasonable person could conclude that they were completely fabricated. TU argued that Dewberry lacked necessary leadership skills, but said that the lead technician posts were designed to allow technical people to *acquire* leadership skills. TU also identified resolving customer complaints as one of the management or leadership skills that distinguished the

new job from Dewberry's present position, but Dewberry's file showed that he was already successfully doing that.

TU fabricated an incident where Dewberry was alleged to have been "rude and confrontational" in a leadership training course a few years before the interviews. Not only did Dewberry deny that this took place, but TU's own written evaluation of Dewberry said that he got along well with others. TU also said that he did not express himself well, and that the promotion were based solely on the interviews. The truth is that the interviewers for the most part did not remember the interview (they all recalled only the same, single question, suggesting collusion), and all admitted basing their decisions on their own personal experiences.

TU wrote that it had "doubt[s] about his competency with regard to the technical aspects of his job," even though five of the six interviewers never looked at his personnel file. A month later, TU wrote Dewberry and said his qualifications and knowledge of the job were comparable to that of the others. At exactly the same time that Dewberry was seeking promotion, his supervisor wrote an evaluation that he was "ready for advancement." In response to questions about Dewberry's non-promotion, however, *the same individual* said that, in order for Dewberry to advance, he'd have to "walk on water, or at least know where the rocks are."

Clearly, the truth is not being told.

Much the same thing happened with the distribution supervisor position. TU claimed that supervisory experience was "essential," and that they excluded candidates

without supervisory experience from the interview pool. However, the job notice listing the "qualifications" for the job made no mention of this requirement. When an original, all-white interview pool was selected, a token African-American was added, but that individual did not have supervisory experience, thereby impeaching the very "requirement" that TU used to excuse the exclusion of African-Americans in the first place. The "requirement" of supervisory experience was also shown to be pretextual when TU soon after promoted Don Shipley, a person without supervisory experience and without an associate degree, to the same job classification.

Neither the district court nor the Fifth Circuit found it necessary to determine whether there was a fact issue on whether TU's articulated reasons were false. Citing the Fifth Circuit's opinion in *Rhodes*, the district court concluded that Dewberry was required to introduce affirmative evidence of a racial motivation, and that he failed to do so. (*See* Appendix B, A-14).

D. The Circuits are Divided on What Constitutes Sufficient Evidence of Discrimination to Survive Summary Judgment

The third element of Dewberry's claim requires him to prove, at trial, both that TU's articulated reason is false and that the defendant intentionally discriminated. *Hicks*, 509 U.S. at 510-11. A plaintiff may establish circumstantial evidence of intentional discrimination by demonstrating that a defendant's articulated nondiscriminatory rationale was pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 1825, 36 L. Ed. 2d 668

(1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981).

A plurality of the circuit courts have construed this Court's decision in *Hicks* to mean that a plaintiff with a *prima facie* case can always succeed in fending off summary judgment if he can demonstrate a genuine issue of material fact as to whether the employer's stated reason for its employment decision is false. *See, e.g., Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1066-72 (3d Cir. 1996) (en banc); *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 342-47 (6th Cir. 1997); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995).

These Circuits also hold that inconsistencies in the employer's summary judgment evidence about its proffered reason are sufficient to create a fact issue on pretext, and thus defeat summary judgment. *McGarry v. Board Of County Comm'rs Of Pitkin*, 175 F.3d 1193, 1202 (10th Cir. 1999); *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1270 (11th Cir. 1999); *Reeves v. Johnson Controls World Servs.*; 140 F.3d 144, 157 (2nd Cir. 1998); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 900 (3d Cir. 1987) (en banc).

The principal support for the position held by these circuits derives from the following passage in *Hicks*:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer

> the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, no additional proof of discrimination is required. But the Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle of Rule [of Evidence] 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'

St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 511 (citations omitted).

The Fifth Circuit, perhaps focusing on an ambiguity in this Court's statement that disbelief, plus a *prima facie* case, "may . . . suffice" to show intentional discrimination, has instead sought to distinguish a "subset of cases" in which disbelief plus a *prima facie* case is sufficient, from those in which it is insufficient as a matter of law, justifying summary judgment (the so-called "pretext-plus" cases). *Ontiveros v. Asarco Inc.*, 83 F.3d 732, 734 (5th Cir.1996); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (en banc). To make this distinction, the Fifth Circuit looks to determine whether the evidence of fabrication is "strong," and whether or not the *prima facie* case is "substantial." *Rhodes*, 75 F.3d at 994.

The Court of Appeals for the District of Columbia also holds that evidence of pretext plus a *prima facie* case will not always suffice to defeat summary judgment. *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1290 n.4 (D.C. Cir. 1998) (en banc). The difference between the position of the Fifth Circuit and that of the D.C. Circuit is one of

degree only. The D.C. Circuit gives evidence of pretext "substantial weight" that will almost always defeat summary judgment, but notes two exceptions where this would not be true. *Id.*

The first "exception" recognized by the D.C. Circuit involves "a case in which the plaintiff calls the employer's explanation into question, but does so in a way that conclusively demonstrates that the real explanation for the employer's behavior is not discrimination, but some other motivation." *Aka v. Washington Hosp. Ctr.*, 156 F.3d at 1291. This exception, however, is consistent with the plurality rule. Evidence of pretext, plus a *prima facie* case, can generally *permit* an inference of intentional discrimination, even though there is always the possibility that other evidence might negate that inference and justify summary judgment.

This exception is also entirely consistent with the traditional rule that a defendant is entitled to summary judgment if it negates an essential element of the plaintiff's claim. *See, e.g., American Economy Ins. Co. v. Tomlinson*, 12 F.3d 505, 507 (5th Cir. 1994).

The second exception recognized by the D.C. Circuit, however, is similar to the rule adopted by the Fifth Circuit: "there may be no legitimate jury question as to discrimination in a case in which a plaintiff has *created only a weak issue of material fact* as to whether the employer's explanation is untrue, and there is abundant independent evidence in the record that no discrimination has occurred." *Aka v. Washington Hosp. Ctr.*, 156 F.3d at 1291 (emphasis added).

The view held by the D.C. and Fifth Circuits is fundamentally inconsistent with that of the Third, Sixth, Seventh, Ninth and Tenth Circuits. Dewberry would clearly prevail under the plurality rule, because the evidence regarding TU's articulated reasons for its employment decisions is replete with inconsistencies and contradictions. For the Fifth Circuit, however, this is not enough. The lower courts in this case required, in addition to a fact issue on pretext, affirmative evidence that "the real reason he was not promoted . . . was because of race." (*See* Appendix B, A-14).

II. The Fifth Circuit Rule is Inconsistent with This Court's Opinion in *Hicks*

It is respectfully submitted that the Fifth Circuit has misapplied *Hicks* in the summary judgment context. Its decision in *Rhodes* erroneously focuses on the holding that a plaintiff cannot *obtain judgment* by proving only that the defendant's proffered reason is pretextual. *Hicks*, 509 U.S. at 515. In a footnote, the Fifth Circuit expressly noted that the standard for granting the Rule 50 motion for judgment in *Hicks* is the same standard for granting a Rule 56 motion for summary judgment. *Rhodes*, 75 F.3d at 993 n. 4. Because of this alleged similarity, the Fifth Circuit in *Rhodes* concluded that *Hicks* required a summary judgment respondent to introduce proof of racial motive in addition to evidence of pretext.

Regrettably, the Fifth Circuit's *en banc* decision in *Rhodes* applied a faulty analysis when comparing the procedural posture in *Hicks* to a motion for summary judgment. *Hicks* involved a bench trial in which the finder of fact found pretext, but no racial motive. *Hicks*, 509 U.S. at 508. This Court merely held that both findings were required to support a judgment for plaintiff. *Hicks*, 509 U.S. at 510-11. More significantly, this Court held that evidence of pretext *may* support a finding of racial discrimination, but that such an inference was not legally compelled. *Hicks*, 509 U.S. at 511. The Fifth Circuit has failed to distinguish between the findings needed for entry of judgment after trial, and the quantum of proof needed to create a fact issue. This distinction was best and most recently explained by the D.C. Circuit:

> Contrary to the dissent's confusion-producing analysis, there is nothing whatsoever inconsistent between this statement and our later statements that (1) the plaintiff must show 'both that the reason was false, and that discrimination was the real reason,' and (2) 'it is not enough . . . to disbelieve the employer.' Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination.

Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1290 n.4 (D.C. Cir. 1998) (en banc).

In other words, while *Hicks* emphasized the need for a separate finding of intentional discrimination to support a final judgment, it clearly implies that disbelief of an employer's proffered reason, combined with a *prima*

facie case, is sufficient to create a fact issue on discrimination and avoid summary judgment.

III. The Fifth Circuit Rule is Inconsistent with the Well-Established Standards for Summary Judgment

Although the Fifth Circuit routinely requires proof of racial motivation in addition to evidence of pretext before allowing a case to proceed to trial, it recognizes, in theory, a "subset of cases" in which disbelief plus a *prima facie* case is sufficient to survive a defense motion for summary judgment.[1] *Rhodes*, 75 F.3d at 994. To make this distinction, the Fifth Circuit looks to determine whether the evidence of fabrication is "strong," and whether or not the *prima facie* case is "substantial." *Id.* Such a determination is fundamentally inconsistent with the well-established standards for summary judgment.

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[1] It is worth noting that the lower courts in this case never considered whether Dewberry's case fell within this "subset of cases," although they were asked to do so. The evidence of Dewberry's *prima facie* case is particularly substantial and should, combined with the evidence of pretext, permit an inference of racial motivation. This case involves an all-white hiring committee which intentionally bypassed TU's personnel department, then passed over African-Americans making up more than a quarter of the hiring pool, in order to give promotions to more than a quarter of the hiring pool. It also involves a single individual who originally didn't want to interview an African-American for the supervisor post, and who passed up all three African-Americans in a pool of only eleven for the three lead technician posts. These facts contrast sharply with the hypothetical example of a "weak" *prima facie* case described in *Hicks*. *Cf. Hicks*, 509 U.S. at 513.

Neither the district courts nor the circuit courts have any business distinguishing between "weak" fact issues and "strong" fact issues on a motion for summary judgment, especially in determining a question as subjective as discriminatory intent. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (court should not weigh evidence on summary judgment).

This Court has recently said, in a redistricting case, that extremely minimal evidence (the shape and lack of compactness of a district) permitted an inference of racial motivation, while the State's nonracial explanation permitted an inference of a political motivation. Where both inferences are possible, there is a fact issue inappropriate for summary judgment. *Hunt v. Cromartie*, 526 U.S. 541; 119 S. Ct. 1545, 1552; 143 L. Ed. 2d 731, 742 (1999). Questions of credibility and the weighing of evidence were functions of the jury, and should not be done on summary judgment. *Id.*; *Anderson*, 477 U.S. at 249.

This language parallels the holding in *Hicks* that the falsity of an employer's proffered reason, plus the facts of the prima facie case, *permit* an inference of intentional discrimination but do not compel one. The fact finder may infer a discriminatory or a nondiscriminatory motive. For the same reasons it expressed in *Hunt v. Cromartie*, this Court should hold that the issue of motive under such circumstances is inappropriate for summary judgment.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, petitioner prays that this Court grant this petition, and that upon final hearing it reverse the judgment of the Fifth Circuit and the trial court and remand this case for trial on the merits.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-10912
Summary Calendar

WILLIAM C DEWBERRY,

Plaintiff-Appellant,

VERSUS

TEXAS UTILITIES ELECTRIC COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas, Dallas Division

(3:98-CV-1889-G)

(Filed FEB 17 2000)

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:*

William C. Dewberry appeals the district court's grant of summary judgment for Texas Utilities Electric

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Company dismissing Dewberry's claims of race discrimination and retaliation. The claims arose out of Dewberry's employment with Texas Utilities and its decisions to not promote Dewberry to any of three positions. Having carefully reviewed the record and studied the briefs of counsel, we AFFIRM for essentially the reasons set forth by the district court in its Memorandum Order dated July 15, 1999.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILLIAM C. DEWBERRY, Plaintiff, VS. TEXAS UTILITIES ELECTRIC COMPANY, Defendant.	)	CIVIL ACTION NO. 3:98-CV-1889-G

MEMORANDUM ORDER

(Filed Jul. 15, 1999)

Before the court is the motion of the defendant Texas Utilities Electric Company ("TU Electric") for summary judgment. For the reasons stated below, the motion is granted.

I. BACKGROUND

Plaintiff William C. Dewberry ("Dewberry"), an African-American male, has been employed by TU Electric, or its predecessor, for over thirty-two years.[1] See Plaintiff William C. Dewberry's Brief in Support of His Response to Defendant Texas Utilities Electric Company's Motion for Summary judgment ("Plaintiff's Brief") at 1. Since

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[1] Dewberry was hired by TU Electric's predecessor, Dallas Power & Light, on June 13, 1967. *See* Defendant Texas Utilities Electric Company's Brief in Support of Its Motion for Summary Judgment at 2.

July 1991, Dewberry has worked for TU Electric as a Senior Engineering Technician. *See* Plaintiff's Brief at 1; Defendant Texas Utilities Electric Company's Brief in Support of Its Motion for Summary Judgment ("Defendant's Brief") at 2. Between June 1997 and May 1998, Dewberry unsuccessfully sought three promotions within TU Electric. *See* Plaintiff's Brief at 1; Defendant's Brief at 2-3. The facts surrounding these three attempts at promotion form the basis of this lawsuit.

In the Spring of 1997, TU Electric created three new positions of Distribution Operations Lead Technician in the Central Region (the "Lead Technician positions"). *See* Defendant's Brief at 3-4; Plaintiff's Brief at 7. In filling these new positions, TU Electric interviewed all the Senior Engineering Technicians, including Dewberry, who were working in the Central Region at the time. Defendant's Brief at 4-5; Plaintiff's Brief at 7. TU Electric ultimately selected three white males to fill the new Lead Technician positions. *See* Plaintiff's Brief at 7-8. After learning that he had not been selected for one of the new positions, Dewberrry [sic] complained to several TU Electric management officials that he thought the selection process was unfair and discriminatory.[2] *See* Defendant's Brief at 10-13.

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[2] On July 21, 1997 Dewberry met with Gary Roberts, Manager of the Central Region, to discuss what he felt were the "shortcomings" in the selection process for the Lead Technician position. *See* Defendant's Brief at 10. On July 30, 1997, Dewberry shared the same concerns with Paul Williams, Vice President of Distribution and Roberts' immediate supervisor. See *id.* at 11-12. On August 19, 1997, Dewberry sent an internal e-mail to Earl Nye, the Chairman of the Board and Chief Executive Officer of

Dewberry alleges that he was not promoted to one of the new Lead Technician positions because of his race. *See* Plaintiff's Brief at 8. TU Electric maintains, however, that Dewberry was not promoted because he failed to demonstrate effective communication skills and potential leadership abilities during the interview and because the candidates who were selected to fill the new positions had more years of experience in the technician job classification than Dewberry. *See* Defendant's Brief at 7-8.

In November 1997, TU Electric had an opening for a Distribution Operations Supervisor in the Arlington Service Center (the "Arlington position"). *See* Defendant's Brief at 13. Approximately thirty-seven people, including Dewberry, applied for the position. *See* Defendant's Brief at 14; Plaintiff's Brief at 8. TU Electric, however, declined to interview Dewberry for the Arlington position because he had no prior experience in a lead or supervisory capacity. *See* Defendant's Brief at 15. Dewberry alleges, however, that supervisory experience was not one of the required qualifications and that the real reason he was not considered for the Arlington position was his race. *See* Plaintiff's Brief at 8-9. Dewberry also claims that TU Electric refused to consider him for the Arlington position in retaliation for his earlier complaints about the selection process for the Lead Technician positions. See *id.* at 10.

Texas Utilities Company, requesting that Mr. Nye review the selection process for the Lead Technician position. See *id.* at 12. Finally, on September 29, 1997, Dewberry met with Debbie Dennis, TU Electric's Human Resources Support and Diversity Manager, to discuss his concerns about the selection process. See *id.* at 13.

On February 19, 1998, approximately one month after learning that he had not been selected for the Arlington position, Dewberry filed a charge of discrimination (the "February 1998 charge") with the Equal Employment Opportunity Commission ("EEOC"), alleging that he was not promoted to the Arlington position because of his race, in violation of Title VII and the TCHRA. *See* Defendant's Brief at 19. The EEOC issued a right-to-sue letter to Dewberry on May 20, 1998. See *id.*

In April 1998, TU Electric had an opening for a Lead Distribution Operations Technician at the Mesquite Service Center (the "Mesquite position"). See Defendant's Brief at 15; Plaintiff's Brief at 10. TU Electric interviewed eleven people, including Dewberry, for the position. *See* Defendant's Brief at 16; Plaintiff's Brief at 10. After completing all the interviews, TU Electric chose a white male to fill the position. *See* Plaintiff's Brief at 10-11. Dewberry alleges that he was not promoted to the Mesquite position because of his race and in retaliation for his earlier complaints regarding the Lead Technician position and for filing the February 1998 charge of discrimination with the EEOC. See *id.* TU Electric maintains, however, that Dewberry was not selected for the Mesquite position because he behaved in a "rude, confrontational, and non-responsive" manner during the interview. *See* Defendant's Brief at 17.

On June 5, 1998, Dewberry filed a second charge of discrimination (the "June 1998 charge") with the EEOC, alleging that he was not promoted to the Mesquite position because of his race and in retaliation for his prior complaints of discrimination. *See* Defendant's Brief at 19.

The EEOC issued a right-to-sue letter to Dewberry on June 22, 1998. See *id.*

Dewberry filed the instant lawsuit on August 11, 1998, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"); the Civil Rights Act of 1991, as amended, 42 U.S.C. § 1981 ("Section 1981"); and the Texas Commission on Human Rights Act, TEX. LAB. CODE ANN. § 21.001 *et seq.* (Vernon 1996) ("TCHRA"). *See* Plaintiff's First Amended Original Complaint ¶¶ 19, 24, and 29. In his complaint, Dewberry alleges that he was denied promotion to (1) the Lead Technician position, (2) the Arlington position, and (3) the Mesquite position on the basis of his race, color, and national origin. See *id.* With respect to the Arlington and Mesquite positions, Dewberry further alleges that he was denied these promotions in retaliation for complaining to TU Electric management officials about the selection process for the Lead Technician position and for filing the February 1998 charge of discrimination with the EEOC. See *id.*

TU Electric filed the instant motion for summary judgment on April 23, 1999. Dewberry has responded, TU Electric has replied, and the motion is now ripe for decision.

II. ANALYSIS

A. Evidentiary Burdens on Motion for Summary Judgment

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled

to judgment as a matter of law. FED. R. CIV. P. 56(c).[3] "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A movant for summary judgment makes such a showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues to support the nonmovant's case. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). The pleadings, depositions, admissions, and affidavits, if any, must demonstrate that no genuine issue of material fact exists. Fed. R. Civ. P. 56(c).

Once the movant makes this showing, the nonmovant may not rest on the allegations in his pleadings. *Celotex*, 477 U.S. at 324; Fed. R. Civ. P. 56(e). Rather, he must direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324. To carry this burden, the "opponent must do more than simply show . . . some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586 (1986). Instead, the nonmovant must present evidence sufficient to support a

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[3] The disposition of a case through summary judgment "reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1197 (5th Cir. 1986).

resolution of the factual issue in his favor. *Anderson*, 477 U.S. at 257.

While all of the evidence must be viewed in a light most favorable to Dewberry as the motion's opponent, *id.* at 255 (citing *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 158-59 (1970)), neither conclusory allegations nor unsubstantiated assertions will satisfy his summary judgment burden. *Little v. Liquid Air Corporation*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc); *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). Summary judgment in favor of TU Electric is proper if, after adequate time for discovery, Dewberry fails to establish the existence of an element essential to his case and as to which he will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23.

B. Discussion of Dewberry's Claims

In his complaint, Dewberry alleges that TU Electric discriminated against him due to his race and retaliated against him in violation of Title VII, Section 1981, and the TCHRA. Although each of these statutes provides a separate cause of action, the evidentiary framework to make out a claim for relief under any of them is the same. *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir.) (Title VII and § 1981), *cert. denied*, ___ U.S. ___, 118 S.Ct. 603, 139 L.Ed.2d 491 (1997); *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 448 n.2 (5th Cir. 1996) (Title VII and § 1981); *Farrington v. Sysco Food Services, Inc.*, 865 S.W.2d 247, 251 (Tex. App. – Houston [1st Dist.] 1993, writ denied) (Title VII and the TCHRA); *City of Austin v. Gifford*, 824 S.W.2d 735, 738-39 (Tex. App. – Austin 1992, no writ) (Title VII

and the TCHRA). The court will thus engage in the same analysis for all of these claims.

1. Race Discrimination

The court applies the burden shifting framework utilized by the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), to analyze Dewberry's claims of race discrimination in employment. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).[4]

Because Dewberry has alleged a discriminatory failure to promote, he must initially establish a *prima facie* case by offering evidence (1) that he belongs to a group protected by Title VII; (2) that he was qualified for the job; (3) that he was not promoted; and (4) that TU Electric promoted a person who is not in his protected class. *Gonzalez v. Carlin*, 907 F.2d 573, 578 (5th Cir.1990); *Bernard v. Gulf Oil Corporation*, 890 F.2d 735, 745 (5th Cir.1989), *cert. denied*, 497 U.S. 1003 (1990).

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[4] This framework is well known:

> First, the plaintiff must establish a *prima facie* case of discrimination; second, if he is so successful, the defendant must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant is so successful, the inference of discrimination raised by the *prima facie* case disappears, and the plaintiff then must prove, by a preponderance of the evidence, both that the defendant's articulated reason is false and that the defendant intentionally discriminated.

Walton v. Bisco Industries, Inc., 119 F.3d 368, 370 (5th Cir. 1997).

Once Dewberry establishes a *prima facie* case, an inference of discrimination arises, and TU Electric must articulate a legitimate, non-discriminatory reason for the failure to promote. See *Grimes v. Texas Department of Mental Health and Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996); *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir. 1996); *Bernard*, 890 F.2d at 745. If TU Electric satisfies this burden of production, Dewberry bears the ultimate burden of proving discrimination by showing that the reason offered is a pretext for prohibited discrimination. *Grimes*, 102 F.3d at 140; *Williams*, 98 F.3d at 181; *Bernard*, 890 F.2d at 745.

To avoid summary judgment at the third-step of the analysis, Dewberry must produce evidence from which a reasonable factfinder could find that TU Electric's stated reason was not the true reason for its decision not to promote Dewberry and that unlawful discrimination was. See *Grimes*, 102 F.3d at 141; *Williams*, 98 F.3d at 181. The Fifth Circuit has set forth the following standard regarding proof of pretext:

> [A] jury issue will be presented and a plaintiff can avoid summary judgment . . . if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that [the protected trait] was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the [adverse employment action] was discriminatory.

Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir.1996) (en banc); see also *Williams*, 98 F.3d at 181-83 (quoting *Rhodes* standard and applying it in Title VII summary judgment context). "*Rhodes* makes clear that a plaintiff must present evidence sufficient to create a reasonable inference of discriminatory intent in order to avoid summary judgment." *Grimes*, 102 F.3d at 141; *LaPierre*, 86 F.3d at 450.

a. *The Lead Technician Positions*

In claiming that TU Electric discriminatorily refused to promote him to one of the new Lead Technician positions in the Central Region, Dewberry asserts (1) that he is an African-American and thus is a member of a protected group; (2) that he was qualified for a Lead Technician position; (3) that he was not promoted to a Lead Technician position; and (4) that TU Electric promoted three white males to the new Lead Technician positions. *See* Plaintiff's Brief at 7-8. TU Electric does not contest these facts. *See* Defendant's Brief at 23 (conceding that Dewberry has established a *prima facie* case of discrimination with respect to the Lead Technician position). Therefore, the court concludes that Dewberry has established a *prima facie* case of discrimination with respect to the Lead Technician positions.

With respect to its burden to articulate a legitimate, nondiscriminatory reason for not promoting Dewberry to one of the Lead Technician positions, TU Electric presented evidence that Dewberry was not promoted because the members of the interview panel determined

that Dewberry was not among the most qualified candidates for the position. *See* Defendant's Brief at 23. Specifically, TU Electric asserts that the interview panel concluded that, compared to Dewberry, the three white candidates who were promoted to the new Lead Technician positions had superior communication skills, leadership abilities, and job knowledge and experience. See *id.* at 23-24. Dewberry accepts this reason as a legitimate, non-discriminatory reason that satisfies TU Electric's burden of production. *See* Plaintiff's Brief at 12. Thus, the court concludes that TU Electric has articulated a legitimate, nondiscriminatory reason for refusing to promote Dewberry to one of the new Lead Technician positions. See *Grimes*, 102 F.3d at 141, 143 (holding that an employer's belief that another employee had "better communication skills, better supervisory skills" and "better program development experience" than the plaintiff was a legitimate reason for the employer's decision not to promote the plaintiff); see also *Stewart v. Houston Lighting & Power Co.*, 998 F.Supp. 746, 753 (S.D. Tex. 1998) (holding that an employee's lack of comparable qualifications constitutes a legitimate, non-discriminatory reason for the denial of an opportunity for promotion).

Because TU Electric has articulated a legitimate, non-discriminatory reason for its failure to promote Dewberry to the Lead Technician position, the burden shifts to Dewberry to prove that TU Electric's proffered reason is a mere pretext. As stated above, in order to avoid summary judgment at this stage, Dewberry must present evidence sufficient to create a reasonable inference of discriminatory intent on the part of TU Electric. See *Grimes*, 102 F.3d at 141.

The summary judgment evidence in this case completely fails to create a reasonable inference that race was a determinative factor in TU Electric's decision not to promote Dewberry to the Lead Technician position. In deposition testimony, Dewberry admits that he has no facts that support his contention that the members of the interview panel based their decision not to promote him on his race. *See* Transcript of Videotaped Oral Deposition of William C. Dewberry ("Dewberry Depo.") at page 213, lines 24-25 through page 214, lines 1-4, in Appendix of Evidence in Support of Defendant Texas Utilities Electric Company's Motion for Summary Judgment ("Defendant's Appendix") at 351-52. The only "proof" Dewberry can point to as evidence of TU Electric's discriminatory intent is his own subjective belief that he was discriminated against on the basis of race. Such a belief, however genuine, simply cannot be the basis for judicial relief. See *Price v. Marathon Cheese Corporation*, 119 F.3d 330, 337 (5th Cir. 1997); see also *Douglass v. United Service Automobile Association*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc) ("It is more than well-settled that an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion").

Because Dewberry cannot point to any evidence that his race was the real reason for TU Electric's failure to promote him, TU Electric is entitled to summary judgment on Dewberry's claim of discrimination with respect to his failure to be promoted to the Lead Technician position. See *Rhodes*, 75 F.3d at 994; see also *Grimes*, 102 F.3d at 139-40 (holding that to survive a motion for summary judgment it is "incumbent upon the non-moving

party to present evidence – not just conjecture and speculation – that the defendant retaliated and discriminated against plaintiff on the basis of [his] race") (citations omitted); *Bowens v. University of Texas Southwestern Medical Center*, 1998 WL 292837, at *4-5 (N.D. Tex. May 29, 1998) (holding that a plaintiff could not survive a motion for summary judgment where the plaintiff's only proof of pretext was the proof supporting his *prima facie* case and his bald assertion that he was the victim of discrimination), *aff'd*, 170 F.3d 184 (5th Cir. 1999) (table).

b. *The Arlington Position*

With respect to the Arlington position, Dewberry asserts (1) that he is a member of a protected group, African-American; (2) that he was qualified for the Arlington position; (3) that he was not promoted to the Arlington position; and (4) that TU Electric promoted a white male to the position. *See* Plaintiff's Brief at 8-9. TU Electric argues, however, that Dewberry has failed to establish a *prima facie* case of discrimination with respect to the Arlington position because Dewberry was not qualified for the position in that he lacked prior supervisory or lead experience. *See* Defendant's Brief at 32.

Dewberry maintains, however, that prior supervisory experience was not a requirement of the Arlington position. In support of his contention, Dewberry presents the job posting for the Arlington position, which lists the following qualifications:

> Two year Technical Degree (Associates) or equivalent work experience. Knowledge of distribution system design, construction, standards, operations and maintenance practices, materials and equipment, environmental standards and regulations, safety handbook and the distribution emergency restoration plan.

See Plaintiff William C. Dewberry's 115 Page Appendix of Evidence in Support of His Response (and Brief) to Defendant Texas Utilities Electric Company's Motion for Summary Judgment ("Plaintiff's Appendix") at 44. Dewberry points out that nothing in the job posting lists prior supervisory experience as a requirement of the position. As TU Electric does not challenge the fact that Dewberry had the required Associates Degree or the required knowledge, Dewberry's evidence is sufficient to establish a genuine issue of material fact as to whether he was qualified for the Arlington position. The court therefore concludes that Dewberry has established a *prima facie* case of discrimination with respect to TU Electric's refusal to promote him to the Arlington position. See *Thornbrough v. Columbus and Greenville Railroad Company*, 760 F.2d 633, 639 (5th Cir.1985) (holding that employment discrimination plaintiffs need only make a minimal showing in order to establish a *prima facie* case).

In attempting to articulate a legitimate, non-discriminatory reason for not promoting Dewberry to the Arlington Position, TU Electric has produced evidence that it declined to interview Dewberry because he lacked prior supervisory experience. *See* Defendant's Brief at 33. Dewberry concedes that this reason constitutes a legitimate, non-discriminatory reason for failing to promote

him to the Arlington position. *See* Plaintiff's Brief at 12-13. The court likewise concludes that TU Electric has articulated a legitimate, nondiscriminatory reason for refusing to promote Dewberry to the Arlington position.

Because TU Electric has articulated a legitimate, nondiscriminatory reason for its failure to promote Dewberry to the Arlington position, the burden shifts to Dewberry to prove that TU Electric's proffered reason is a mere pretext. Again, the court must consider whether Dewberry has presented evidence sufficient to create a reasonable inference of discriminatory intent on the part of TU Electric. See *Grimes*, 102 F.3d at 141.

Dewberry has presented no evidence of racial animus to support his claim that he was denied the promotion to the Arlington position based on his race. Again, in deposition testimony, he admits that he has no facts to support his discrimination claim. *See* Dewberry Depo. at page 230, lines 1-11 and page 231, lines 1-7, in Defendant's Appendix at 363-64. Dewberry's subjective belief that he was discriminated against is insufficient to withstand TU Electric's motion for summary judgment. See *Price*, 119 F.3d at 337 (holding that summary judgment was appropriate where the plaintiff's discrimination claims rested solely on conclusory allegations and the plaintiff's unsupported subjective belief that discrimination had occurred); see also *Douglass*, 79 F.3d at 1430. The court concludes that TU Electric is entitled to summary judgment because the evidence taken as a whole would not allow a jury to infer that the actual reason for TU Electric's refusal to promote Dewberry was discriminatory. See *Rhodes*, 75 F.3d at 994; see also *Bowens*, 1998 WL

292857 at *5 (holding that "without any evidence establishing a connection between the defendants' actions and [the plaintiff's] race, a verdict in favor of [the plaintiff] on his claims of discrimination would be insupportable as a matter of law.").

c. *The Mesquite Position*

With respect to the Mesquite position, Dewberry asserts (1) that he is a member of a protected group, African-American; (2) that he was qualified for the Mesquite position; (3) that he was not promoted to the Mesquite position; and (4) that TU Electric promoted a white male to the position. *See* Plaintiff's Brief at 11. TU Electric does not contest these facts. *See* Defendant's Brief at 35 (conceding that Dewberry has established a *prima facie* case of discrimination with respect to the Mesquite position). Thus, the court concludes that Dewberry has established a *prima facie* case of discrimination with respect to the Mesquite position.

As its legitimate, nondiscriminatory reason for not promoting Dewberry to the Mesquite position, TU Electric has offered evidence that Dewberry ranked significantly lower than the other interviewees with respect to leadership, interpersonal, and communication skills. *See* Defendant's Brief at 35-36. Specifically, TU Electric asserts that, during the interview for the position, Dewberry refused to answer questions from the panel, implied that some of the panel's questions were foolish, and accused the panel of having already made up its mind as to whom it would promote. See *id.* at 36. Kyle Davis ("Davis") and

Gilbert Rascon ("Rascon"), the two TU Electric management officials responsible for selecting a candidate to fill the Mesquite position, perceived Dewberry's conduct during the interview to be non-responsive, "rude and confrontational," and they concluded that Dewberry lacked the interpersonal and communication skills required for the position. *See* Affidavit of Gilbert Rascon ("Rascon Aff.") ¶ 8, in Defendant's Appendix at 167-68.

Dewberry accepts that TU Electric's stated reason for refusing to promote him to the Arlington position is legitimate and non-discriminatory. *See* Plaintiff's Brief at 13. Similarly, the court concludes that TU Electric has articulated a legitimate, nondiscriminatory reason for refusing to promote Dewberry to the Arlington position. Thus, because TU Electric has articulated a legitimate, non-discriminatory reason for its failure to promote Dewberry to the Mesquite position, the court must consider once more whether Dewberry has presented evidence sufficient to create a reasonable inference of discriminatory intent on the part of TU Electric. See *Grimes*, 102 F.3d at 141.

Again, however, Dewberry has failed to present any evidence that the real reason he was not promoted to the Mesquite position was because of his race. He merely relies on the evidence supporting his *prima facie* case and his subjective belief that he was discriminated against to satisfy his burden at this stage of the analysis. Such "proof," however, fails to create an issue of material fact for trial. Moreover, Dewberry admits that, during his interview, he accused the interviewers of having selected the candidate they were going to promote prior to beginning the interview process and that the interviewers

could have perceived his comments as rude and confrontational. *See* Dewberry Depo at page 251, lines 21-25 through page 252 lines, 1-11 and page 254, lines 17-25 through page 255, lines 1-13, in Defendant's Appendix at 380-81 and 383-84. Accordingly, TU Electric is entitled to summary judgment because the evidence taken as a whole would not allow a jury to infer that the actual reason for TU Electric's refusal to promote Dewberry was discriminatory. See *Bowens*, 1998 WL 292837, at *5 (holding that summary judgment is proper where the most favorable view of the evidence suggests only that the plaintiff is an African-American who suffered an adverse employment action, and not that the plaintiff suffered an adverse employment action because he is an African-American).

2. Retaliation

As with his claims of race discrimination, the court applies the *McDonnell Douglas/Burdine/St. Mary's* burden shifting framework to Dewberry's claims of retaliation. See *Grimes*, 102 F.3d at 143 (applying the burden-shifting framework to the plaintiff's retaliation claims); see also *Long v. Eastfield College*, 88 F.3d 300, 304 (5th Cir.1996) (stating that the burden-shifting structure is applicable to Title VII unlawful retaliation claims). This framework requires that if Dewberry establishes a *prima facie* case of retaliation, a presumption of discrimination arises, and TU Electric must articulate a legitimate, non-discriminatory reason for the failure to promote. See *Long*, 88 F.3d at 304-05. If TU Electric satisfies its burden of production, Dewberry must prove the ultimate issue of retaliation by

showing that the reason offered is a pretext for prohibited discrimination. *Long*, 88 F.3d at 305.

To establish a prima facie case of retaliation, Dewberry must show (1) that he engaged in an activity protected under Title VII; (2) that an adverse employment action occurred; and (3) that there was a causal connection between the protected activity and the adverse employment decision. See *Long*, 88 F.3d at 304; *Gonzalez*, 907 F.2d at 578. An employee engages in an activity protected by Title VII if he opposes allegedly discriminatory practices by the employer or participates in a proceeding, charge, or hearing where such practices are challenged. See *Long*, 88 F.3d at 304; see also *DeAnda v. St. Joseph Hospital*, 671 F.2d 850, 852 n. 1 (5th Cir. 1982). Adverse employment actions include discharges, demotions, reprimands, refusals to hire, and refusals to promote. *Pierce v. Texas Department of Criminal Justice, Institutional Division*, 37 F.3d 1146, 1149 (5th Cir.1994), *cert. denied*, 514 U.S. 1107 (1995). To establish the requisite causal link, Dewberry must show that the adverse action was based at least in part on TU Electric's knowledge of his protected activity.

a. *The Arlington Position*

With respect to the Arlington position, Dewberry asserts (1) that he complained to TU Electric management officials about discrimination in the selection process for the Lead Technician positions; (2) that TU Electric refused to promote him to the Arlington position; and (3) that the TU Electric management official who refused to promote him was aware of his complaints to other TU Electric

officials. *See* Plaintiff's Brief at 10. TU Electric admits that, at the time the successful candidate was awarded the Arlington position, the management official who refused to promote Dewberry was aware of Dewberry's complaints regarding the selection process for the Lead Technician positions and thus does not dispute that Dewberry has established a *prima facie* case of retaliation. *See* Defendant's Brief at 39. Therefore, the court concludes that Dewberry has established a *prima facie* case of retaliation with respect to the Arlington position. See *Bowens*, 1998 WL 292837, at *5-6 (recognizing that knowledge of prior complaints and a close timing between the protected activity and the adverse employment action will suffice to establish the *prima facie* causal link).

As discussed above with respect to Dewberry's complaints of racial discrimination, TU Electric maintains that it declined to interview Dewberry for the Arlington position because he lacked prior supervisory experience. *See* Defendant's Brief at 33. Dewberry concedes that this reason constitutes a legitimate, non-retaliatory reason for failing to promote him to the Arlington position. *See* Plaintiff's Brief at 12-13. The court likewise concludes that TU Electric has articulated a legitimate, non-retaliatory reason for refusing to promote Dewberry to the Arlington position.

To withstand summary judgment on this claim, therefore, Dewberry must produce evidence that would allow a reasonable jury to find that unlawful retaliation, not the superior qualifications of others, was the "cause in fact" of his injury. The "cause in fact" analysis of pretext requires proof of a significantly stronger relationship between the adverse employment action and the alleged

retaliation than is required to support Dewberry's *prima facie* case. *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 n.8 (5th Cir. 1998); *Long*, 88 F.3d at 305 n.4; *McDaniel v. Babbitt*, 1998 WL 75886 at *4 (N.D. Tex. Feb. 11, 1998), *aff'd* 163 F.3d 1355 (5th Cir. 1998) (table). Rather than merely showing some possible relationship, the "ultimate issue of retaliation requires the employee to prove that the adverse employment action would not have occurred 'but for' the protected activity." *Sherrod*, 132 F.3d at 1122.

Thus, to survive summary judgment at this stage, Dewberry must show that TU Electric engaged in illegal retaliation and "but for" TU Electric's retaliation, Dewberry would have been promoted. See *Sherrod*, 132 F.3d at 1122. Dewberry, however, has presented no evidence to show that, absent his complaints about the selection process, he would have been promoted to the Arlington position. Moreover, Dewberry admits in deposition testimony that he has no facts to support his allegation that he was denied an interview based on his prior complaints of discrimination. *See* Dewberry Depo. at page 231, lines 8-21, in Defendant's Appendix at 364. Thus, TU Electric is entitled to summary judgment. See *Grimes*, 102 F.3d at 143 (holding that summary judgment was proper because the employer concluded that a candidate who possessed better supervisory skills was more qualified for a position than the plaintiff and the plaintiff failed to show that "but for" her prior complaint of discrimination she would have been promoted).

b. *The Mesquite Position*

With respect to the Mesquite position, Dewberry asserts (1) that he filed a charge of discrimination with the EEOC in February 1998, alleging that he was not promoted to the Arlington position because of his race, in violation of Title VII and the TCHRA; (2) that TU Electric refused to promote him to the Mesquite position; and (3) that the TU Electric management officials who refused to promote him were aware of his complaints to TU Electric management officials about discrimination in the selection process for the Lead Technician positions and the February 1998 EEOC charge. *See* Plaintiff's Brief at 11. TU Electric disputes Dewberry's allegation that Rascon and Davis, the TU Electric officials who were responsible for filling the Mesquite position, were aware that Dewberry had made internal complaints regarding the selection process for the Lead Technician position or that Dewberry had filed the February 1998 charge. *See* Defendant's Brief at 41. TU Electric points to evidence in the summary judgment record which supports its contention that Rascon and Davis had no knowledge of Dewberry's complaints and argues that Dewberry has failed to establish a *prima facie* case of retaliation with respect to the Mesquite position. *See* Rascon Aff. ¶ 11, in Defendant's Appendix at 169; Affidavit of Kyle Davis ("Davis Aff.") ¶ 15, in Defendant's Appendix at 175.

Even if it is assumed, *arguendo*, however, that Dewberry has presented a *prima facie* case of retaliation with respect to the Mesquite position, his claim fails for want of evidence from which a reasonable jury could conclude that the legitimate reasons offered by TU Electric were pretexts for retaliation. TU Electic [sic] has stated that,

during his interview, Dewberry refused to answer questions from the panel, implied that some of the panel's questions were foolish, and accused the panel of having already made up its mind as to whom it would promote. *See* Defendant's Brief at 36. Based on this conduct, Rascon and Davis concluded that Dewberry lacked the leadership, interpersonal, and communication skills required for the position. See *id; see also* Rascon Aff. ¶¶ 8 and 12, in Defendant's Appendix at 167-69; Davis Aff. ¶¶ 9 and 12, in Defendants' Appendix at 173-74. This is a legitimate explanation for TU Electric's refusal to promote Dewberry to the Mesquite position. *See also* Plaintiff's Brief at 13 (acknowledging that TU Electric's stated reasons for refusing to promote Dewberry to the Mesquite position is a legitimate, non-retaliatory reason).

In response, Dewberry has failed to present any evidence showing that, in the absence of his prior complaints, he would have been the successful candidate. Without such proof, the court cannot conclude that a reasonable jury could find that unlawful retaliation was the cause-in-fact of Dewberry's failure to be promoted to the Mesquite position. Accordingly, TU Electric is entitled to summary judgment. See *Grimes,* 102 F.3d at 143; see also *McDaniel,* 1998 WL 75886 at *4.

III. CONCLUSION

Dewberry has failed to carry his burden of producing evidence on the basis of which a reasonable jury could conclude that TU Electric's legitimate reasons for refusing

to promote him were a pretext for discrimination or retaliation. Thus, TU Electric's motion for summary judgment is **GRANTED.**

SO ORDERED.

July 15, 1999.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge